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NO. 470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SEARS, ROEBUCK & CO.,
Petitioner,
v.
CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING FITTERS, LOCAL UNION No. 419, AFL-CIO
and
FRANCES SUBLETTE, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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correct, and the legal theory on which he proceeds may be untested and erroneous. Under § 10(l) even in situations in which eventual success on the merits is marginal the Board must proceed. The General Counsel's discretion is exhausted when he decides to issue a complaint since the Act requires that in every instance in which a § 8(b)(4) complaint is issued an injunction must be sought. Thus initiating a § 10(l) suit is a mere ministerial act.

This being so it strains credulity to say that a major battle was fought in Congress solely over who was to have the right to start the injunctive proceeding. On the other hand, the course of the legislative debate makes perfect sense if the dispute was over whether the Board was also to have the exclusive power to make discretionary litigation judgments as to the theory to be pursued, the scope of relief to be sought, the motions to be made, and the proper point at which to terminate the proceeding. For the heart of the problem prior to 1932 had been the systematic distortion of the judicial function at the behest of business interests with a personal stake in the outcome, and the consequent identification of the courts with those interests, *see* Frankfurter & Greene at 47, 137. This was the history that was fresh in the minds of the Senators who accepted § 10(l) but refused to support the Ball Amendment. It is the history that compels approval of the decision reached by the court below.

3. In its heyday the labor injunction grew like Topsy. In large measure it did so because employers intent on injunctive relief were quick to press for every possible advantage without regard to the effect of their tactics on the overall logic of the law. It was precisely for this reason that Norris-LaGuardia was cast in such absolute terms, *see, e.g.*, 75 Cong. Rec. 4776 (1932) (Remarks of Sen. Long) ("We can sit up at night and write all we want into this bill, but we are still going to have plenty of difficulty keep-

ing the necessity of lawyers who are seeking injunctions from finding a door wide enough to keep through [illegible], and that the Ball Amendment was rejected. The position espoused by Sears in this litigation proves the wisdom of this absolute prohibition of the private labor injunction.

Sears' basic theory (Br. 11) is that Congress intended all those who have the right to "appear by counsel and present any relevant testimony" to be parties in 10(l) cases. The short, but complete, answer is that the draftsmen of the Taft-Hartley Amendments used the word "party" when they intended to grant that status, *see, e.g.*, the third proviso to 10(l). A fuller answer is that Sears' view does not meet the contention that the enactment of 10(l) and the rejection of the Ball Amendment were motivated by a desire to avoid a repetition of the abuses which had flourished prior to 1932. *See* pp. 4-8, *supra*. Finally, it is all but impossible to understand how the statement "in general charging parties enjoy the status of 'parties' in proceedings under Section 10(l), possessing all the rights and privileges . . . such as the right to seek appellate review attendant to that status." (Br. 14) can be squared with the admission that charging parties are "unable to alter the theories, facts, or nature of relief sought by the Board" (Br. 30). Certainly, those rights are normally attendant on party status, and the fact that they were not granted demonstrates that employers are not parties to 10(l) suits in any conventional sense. Indeed Sears admission does more. It recognizes that Congress was not concerned solely with vesting the Board with exclusive power to initiate 10(l) proceedings, and that it was also concerned with assuring that employers were restricted to a subordinate role throughout the course of such litigation. *See, Business Machine & Office Appliance Mechanics*, 201 F.2d at 242. Plainly, the right to appeal when the Board decides it is inadvisable to do so is inconsistent with that role. It is simply semantic legerde-

main to say that an independent appeal is an act in aid of the Board. And of course it is Congress's expressed desire to have the employer play a subordinate role in §10(l) cases which distinguishes the question presented here from the question of a charging party's right to intervene in a review proceeding which was decided in *International Union, UAW* v. *Scofield*, 382 U.S. 205 (1965).

Underlying Sears' basic argument is the view (Br. 16-17) that employers must have the right to appeal from a denial of a §10(l) injunction in order to have an effective remedy for alleged violations of §8(b)(4). However, the fact is that the arsenal of remedies of one who complains of secondary activity is the most complete in federal labor law.

First, while Sears neglects to mention the provision, the Act contains §303 which provides for private damage actions. No employer unfair labor practice gives rise to a private cause of action in federal courts.

Second, §10(l) provides for mandatory injunctions. There is no provision for mandatory injunctions against employer unfair labor practices. The result is that despite the fact that four times as many complaints are issued against employers as against unions; seven times as many injunctions are issued against unions as against employers. Thirty-third Annual Report of the National Labor Relations Board, Tables 8 and 20.

Third, the fact that the Board enforces §10(l) provides substantial benefits to employers. It means that even though Sears has the long pocket here the government carries the main burden of litigation which forces the union to defend itself in two forums, the District Court and the Board. And of course the Board is not encumbered, nor do unions have the benefit of, the bond and security requirements of Rules 62(c) and 65(c) of the Federal Rules of Civil Procedure, or of defenses such as "unclean hands,"

Henderson v. *Local 701, Operating Engineers*, — F.2d. —, 73 LRRM 2111, 2115 (C.A. 9th Cir., 1969).

Finally, in light of the unhappy history of the over-utilization of the labor injunction, the recognition that the issuance of a temporary injunction "may effectively dispose of the [union's] rights" *Curry*, 371 U.S. at 550, the absence of financial recourse for a union that has been wrongly enjoined, the existence of the employers' 303 damage remedy, the certainty that the mandatory direction to the Board to proceed in all 8(b)(4) complaint cases will produce suits lacking in equity, and the language of 10(l) which states that the court shall grant "such . . . relief . . . as it deems just and proper", it was to be expected that the courts would act only on a showing that the probability of ultimate success on the merits is clear. This has not happened. In general, the lower courts have not been sensitive to this Court's admonition that:

> "A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made. . . . The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944).

Instead of weighing the necessity of an injunction, the courts have been content to ascertain whether there is reasonable cause to believe that the Board's allegations are true, *see, e.g., Warehousemen Union* v. *Hoffman*, 302 F.2d 352 (C.A. 9th Cir., 1962). Acting under this erroneous standard they have consistently granted 90% of the Board's petitions to

enjoin allegedly secondary conduct, Thirty-Third Annual NLRB Report, Table 20.

Thus the remedies available as of now are strong and pervasive. Indeed, it is fair to say that the situation today bears an unfortunate resemblance to that which prevailed in 1931. Yet Sears attempts to build on this already formidable structure. It seeks to keep the basic benefits of Board enforcement, without any of the limitations that flow from the subordinate status of private parties in §10(l) proceedings, and to turn ancillary remedy *pendente lite* into the centerpiece of the remedial scheme for violations of §8 (b)(4).

As we have noted, in pursuing this goal Sears has not been loath to stretch the Act or its legislative history out of shape. Nor, as we now show, has it been content to develop its position within the restraints imposed by the Constitution. For it argues (Br. 37-43) that due process requires the conclusion that employers have the right to appeal denials of §10(l) injunctions. But due process does not grant the right of appeal. While "it is now fundamental that once established [avenues of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts . . . This Court has never held that the States [or the federal government] are required to establish avenues of appellate review . . ." *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966). At the same time that it proposes broadening the Fourteenth Amendment to meet its requirements in this case, Sears seeks to do away with the limitation in Article III, inconvenient here, which requires a case and controversy as the condition precedent to the federal court's power to render decisions.

Since the Board has decided this case on the merits, the temporary injunction Sears seeks, if obtained would have lapsed, *Reynolds* v. *Nashville Building Trades Council*, 383 F.2d 562, 564 (C.A. 6th Cir., 1967). Thus a decision at

this time on Sears' right to obtain injunctive relief from the court below requires an advisory opinion. Any order issued would be wholly ineffectual "for want of a subject matter on which it could operate," *Brownlow* v. *Schwartz*, 261 U.S. 216, 217 (1923); *California* v. *San Pablo & Tulare Railroad Co.*, 149 U.S. 308, 314 (1893). And it is plain that the line of authority stemming from *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911), through *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969), invoked by Sears, is irrelevant. It stands for the proposition that orders, which have lapsed in a formal sense, but which would have a certain and continuing effect on a petitioner's conduct can be the occasion of a live controversy in this court. Here, however, it is fanciful to postulate any continuing effect of the refusal to issue an injunction or the order dismissing its appeal on the conduct of Sears' affairs. Only if Sears files a new 8(b)(4) charge, a complaint is issued, a district court refuses an injunction and the Board refuses to appeal, will this situation be repeated. Plainly, "such speculative contingencies afford no basis" for a determination of Sears claim, *Hall* v. *Beals*, 396 U.S. 45 (1969). The error in its argument to the contrary is that it focuses on the legal question raised rather than on the effects of the order sought. That focus, if adopted, would completely undermine the case and controversy requirement, for every legal question of any consequence is certain to arise with some frequency. If that is all that is required, the courts would be well launched on the course of deciding "abstract propositions of law." *Hall* v. *Beals*, 396 U.S. at 48.

CONCLUSION

For the reasons stated, as well as those advanced by the Union and the Board, this Court should vacate its order granting the petition for a writ of certiorari on the ground that the case has become moot. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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